IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1124 OF 2004
IN
SUIT NO.1003 OF 2004

Rikhiram T. Arora & Ors. ....Plaintiffs

V/s.

Rameshkumar T. Sachdev & Ors. ....Defendants

Mr.B. Saraf with Mr.Karnik Desai i/b Mehta & Laljee & Co. for the Plaintiffs - in support of the Chamber Summons.

Mr.P.K. Samdani with Mr.F.Z. Behramkomdin i/b M/s.Wadia Gandhy & Co. for Defendant Nos.1 and 2 - to show cause.

Ms.Namrata Mishra i/b S.K. Srivastav for Defendant No.3 - to show cause.

Mr.F.T. D'vitre i/b T.N. Tripathi for Defendant Nos.4 to 8 - to show cause.

CORAM : S.J. VAZIFDAR, J.
DATED : 31ST AUGUST, 2004.

P.C. :

1. The suit was filed on 5th March, 2004 for partition. Plaintiff No.1 and Defendant No.1 are brothers. Plaintiff Nos.2 and 3 are the wife and son of Plaintiff No.1. Defendant No.3 is also a son of Plaintiff Nos.1 and 2. Defendant No.2 is the wife of

Defendant No.1. The other Defendants are third parties who were impleaded by virtue of an amendment in view of the fact that Defendant No.1 has created in their favour development rights in respect of some of the suit properties.

2. The Plaintiffs now seek to amend the suit by introducing a case of pre-emption.

3. Mr.Samdani and Mr.D'Vitre, the learned counsel appearing on behalf of the concerned Defendants submitted that the Chamber Summons is not taken out in good faith. The explanation in the affidavit in support is that the Plaintiffs, due to urgency, did not instruct their advocate regarding their case of pre-emption. The explanation they contended is false as after the suit was filed, no application for interim reliefs was made for about three months.

4. It is difficult to decide this question at this stage. That a Notice of Motion was taken out three months after the suit was filed would not by itself justify a conclusion at this stage that the application is not in good faith. If on merits at the trial the Defendants establish that the plea of pre-emption is false the Plaintiffs will necessarily

fail on this issue. This is therefore not a ground to reject the amendment. For this reason nor would I deny the Plaintiff the right to seek this amendment even assuming it is sought after Defendant No.1 expressed his willingness to submit to a decree on admission. The issue of existence of a right of pre-emption is nevertheless to be determined.

5. It is always open to a co-owner to establish a right of pre-emption and claim reliefs based on a valid exercise of that right and in the alternative, in the event of his being unable to establish such right to claim partition. In this case the Plaintiffs sought partition but did not in the plaint in the first assert a right of pre-emption. Based on this, it was contended on behalf of the Defendants that there was an implied admission that the Plaintiffs only right was to seek partition and that the Plaintiffs never had a right of pre-emption. The submission is not well founded.

6. Whether the Plaintiffs in fact had a right of pre-emption is a question of fact which must necessarily be decided at the final hearing of the suit. If the Defendants' contention is correct, the suit will fail. Moreover, it is always open to a

party to explain an admission. The veracity of the explanation will also be determined at the final hearing of the suit.

7. In the circumstances, the Chamber Summons is made absolute in terms of prayer (a). The amendments shall be carried out within eight weeks from today. This order is without prejudice to the Plaintiffs' pending Notice of Motion and to the ad-interim order therein.

8. The learned counsel appearing on behalf of the Defendants make a statement that they shall consent to an application for adjournment of the Notice of Motion in view of their having applied for a stay of the operation of this order. Accordingly the operation of this order is stayed for a period of twelve weeks to enable the Defendants to challenge this order.

. Parties to act on an ordinary copy of this order duly authenticated by the Chamber Registrar / Court Stenographer of this Court.